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Supreme Court, U.S.
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No. 01-1648

IN THE
SUPREME COURT OF THE UNITED STATES

LONNIE GLOVER AND DAWN GLOVER,
AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

STANDARD FEDERAL BANK, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION TO DEFER CONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 21 of the Rules of this Court, undersigned counsel respectfully submits this motion to defer consideration of the petition for a writ of certiorari, docketed with the Clerk on May 10, 2002. The petition is scheduled to be acted upon at the September 30, 2002 conference. Petitioners respectfully request that consideration of the petition be deferred until briefing on the petitions in two related cases is completed. Undersigned counsel represents the parties who will be petitioning for a writ of certiorari in those related cases. The purpose of this motion is to have this case considered with the other two cases at the same conference.

The petition raises questions important to the proper administration of the real estate mortgage lending business and the sound application of this Court's administrative deference doctrines. The evidence before the district court established that respondent routinely pays fees –

based on a percentage of the amount of a loan in excess of the market interest rate – to brokers who refer loans to respondent. Such payments are flatly inconsistent with § 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), which prohibits the payment of "any fee, kickback, or thing of value pursuant to any agreement or understanding * * * that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." In rejecting the district court's fact-based analysis, the Eighth Circuit instead held that it was required to defer to a policy statement issued by the Department of Housing and Urban Development ("2001 Policy Statement") that was issued for the announced purpose of overruling an Eleventh Circuit decision that had upheld the certification of a class to challenge those lender payments. *See* Pet. 15-20; *Culpepper v. Irwin Mortgage Corp.*, 253 F.3d 1324 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 930 (2002).

Accordingly, the petition presents an issue of great importance to the millions of consumers who obtain mortgages every year and who are forced to pay increased costs to finance the payment by lenders to brokers of those illegal fees: whether a class may be certified to challenge a lender's uniform practice of paying premiums to mortgage brokers for directing loans at above-par interest rates as a violation of RESPA § 8(a), where the payments are made pursuant to standard form contracts and bear no relation to services performed by the broker. Moreover, it presents an administrative law question of fundamental importance: whether a court must defer to an agency policy statement that was not issued pursuant to notice-and-comment rulemaking and lacks the force of law, when the policy statement purports to interpret regulations that simply mirror the statutory text and reverses the longstanding prior position of the agency.

In this case, the Eighth Circuit deferred to the 2001 Policy Statement's view that a

violation of RESPA § 8(a) could be proved only on a loan-by-loan basis, and that liability could be demonstrated only if the total amount of the fee received by the broker was "unreasonable" in view of the services performed, even though the evidence adduced by the district court established that respondent's lending practices were uniform by contract and custom and that *no* services were made in exchange for those payments. HUD itself has recognized – both previously and subsequently – that RESPA § 8(a) may be enforced through appropriate "class relief." Department of Housing and Urban Development, *Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages To Reduce Settlement Costs To Consumers; Proposed Rule*, 67 Fed. Reg. 49133, 49155 (July 29, 2002); *see* Pet. 28. Thus, administrative deference was used not to clarify any ambiguity in the statute but rather to deny ordinary consumers of their procedural rights under Federal Rule of Civil Procedure 23.

On the first issue, the petition and Judge Kleinfeld's dissent in one of the related cases, *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004 (9th Cir. 2002), noted that the Eighth Circuit's decision below is in conflict with the Eleventh Circuit's judgment in *Culpepper*, and that its reasoning was inconsistent in important respects with a decision of a divided Ninth Circuit panel in *Schuetz*. *See* Pet. 15-20; Reply Br. 3-5; *see also Schuetz*, 292 F.3d at 1014 & n.1 (Kleinfeld, J., dissenting). In *Heimmermann v. First Union Mortgage Corp.*, No. 99-14066, 2002 WL 31067330 (Sept. 18, 2002), the Eleventh Circuit held that the 2001 Policy Statement overruled its decision in *Culpepper*. (A copy of the slip opinion in *Heimmermann* is attached.)

While purporting to bring itself into line with the Eighth and Ninth Circuits on the appropriateness of class certification of claims that a lender's uniform payments to brokers violate RESPA § 8(a), the *Heimmermann* decision deepens the confusion engendered in *Glover*

and *Schuetz* on the second issue raised in the petition: when must an informal agency policy statement be given deference and what level of deference is due. In *Glover*, the Eighth Circuit specifically held that the 2001 Policy Statement does not warrant *Chevron* deference because it lacks the force of law (*see* Pet. App. 12a) and instead held alternately that the statement should be afforded deference under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), or consideration under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 12a-14a. The Ninth and Eleventh Circuits have now held that the 2001 Policy Statement *is* entitled to *Chevron* deference. In all three instances, the courts of appeals have deepened existing conflicts – developed after this Court's decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Christensen v. Harris County*, 529 U.S. 576 (2000) – on the level of deference to be afforded to informal policy statements that lack the force of law. *See* Pet. 20-30.

If the Court grants this motion, in order to facilitate disposition of the cases this Term, counsel will file petitions for a writ of certiorari in both *Schuetz* and *Heimmermann* on or before October 17, 2002, even though those petitions would not be due until November 6, 2002, and December 17, 2002, respectively. A filing by October 17, 2002, would facilitate the Court's consideration of all three cases at its conference scheduled for December 13, 2002.

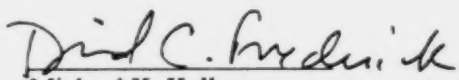
Consolidated handling of these three cases would enable the Court to consider the applicability of the 2001 Policy Statement as announcing a rule that both effectively prohibits class certification and exonerates lenders from RESPA § 8(a) liability. In *Schuetz*, the Ninth Circuit held that *Chevron* deference requires not only denying certification of the class but also the granting of summary judgment in favor of the lender. *See* 292 F.2d at 1006. In *Heimmermann*, the Eleventh Circuit reversed a district court decision certifying the class on the

ground that the 2001 Policy Statement "overrules" its prior precedent in *Culpepper*. *See* 2002 WL 31067330, at *6. Thus, in tandem with *Glover*, this Court will have an opportunity to assess which case is the best vehicle for resolving both the RESPA and the administrative law issues. If this Court were to deny the petition in *Glover* before the filing of petitions in *Schuetz* and *Heimmermann*, such a ruling could deprive 750,000 class plaintiffs of an opportunity to join together to challenge practices that are inconsistent with the plain language of the statute.

* * * * *

For the foregoing reasons, the motion to defer consideration of the petition for a writ of certiorari should be granted.

Respectfully submitted,



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United States Court of Appeals,
Eleventh Circuit.

Daniel **HEIMMERMANN**, individually and on behalf of themselves and class described, Emily **Heimmermann**, individually and on behalf of themselves and a class described, Plaintiffs-Appellees,
v.
FIRST UNION MORTGAGE CORPORATION, Defendant-Appellant.

No. 99-14066.

Sept. 18, 2002.

Borrowers brought suit against mortgage lender for its alleged payment of illegal referral fee to mortgage broker in connection with roughly 22,000 loans. Plaintiffs moved for class certification. The United States District Court for the Northern District of Alabama, No. 98-02357-CV-J-NW, 188 F.R.D. 403, Inge P. Johnson, J., granted motion. Lender appealed. The Court of Appeals, Edmondson, Chief Judge, held that: (1) statement of policy (SOP) issued by Department of Housing and Urban Development (HUD), regarding when payment of yield spread premiums (YSP) from mortgage lenders to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA), could apply retroactively; (2) SOP was entitled to *Chevron* deference; and (3) grant of class certification was abuse of discretion, as district court applied wrong legal standard in light of SOP.

Vacated and remanded.

[1] Federal Courts ⇐0

170Bk0 k.

Court of appeals reviews a district court's certification of a class for abuse of discretion. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[2] Federal Courts ⇐0

170Bk0 k.

It is an abuse of discretion for a district court to apply the wrong legal standard.

[3] Consumer Credit ⇐0
92Bk0 k.

Statement of policy (SOP) issued by Department of Housing and Urban Development (HUD) and prior SOP it purportedly clarified, regarding when payment of yield spread premiums (YSP) from mortgage lenders to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA), were clarifications of existing law rather than new rules or regulations, and therefore, statements could be retroactively applied to previous transactions. Real Estate Settlement Procedures Act of 1974, §8, 12 U.S.C.A. §2607.

[4] Administrative Law and Procedure ⇐0
15Ak0 k.

While not dispositive, an agency's determination that a new policy statement is a clarification of existing law, rather than an entirely new rule, is generally given much weight.

[5] Federal Courts ⇐0
170Bk0 k.

Court of appeals will defer to an agency's statement that a new rule is a clarification of the law, instead of a new rule altogether, unless the prior interpretation is patently inconsistent with the later one.

[6] Administrative Law and Procedure ⇐0
15Ak0 k.

A significant indicator that an agency's policy statement only clarifies existing law, and does not create an entirely new rule, is when the law supposedly being clarified is ambiguous.

[7] Consumer Credit ⇐0
92Bk0 k.

Statement of policy (SOP) issued by Department of Housing and Urban Development (HUD), regarding when payment of yield spread premiums (YSP) from mortgage lenders to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA), was entitled to deference under *Chevron*; plain language of

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RESPA did not address when YSP constituted illegal kickback, RESPA's delegation to HUD of authority to make interpretations gave SOP force of law, and SOP was consistent with RESPA's goal of eliminating referral fees that unnecessarily increase costs of certain settlement services. Real Estate Settlement Procedures Act of 1974, §8, 12 U.S.C.A. §2607.

[8] Administrative Law and Procedure ⇐0
15Ak0 k.

Formal notice-and-comment was not needed to extend *Chevron* deference to statement of policy (SOP) issued by Department of Housing and Urban Development (HUD), regarding when payment of yield spread premiums (YSP) from mortgage lenders to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA); RESPA expressly delegated to HUD authority to issue interpretations. Real Estate Settlement Procedures Act of 1974, §8, 12 U.S.C.A. §2607.

[9] Administrative Law and Procedure ⇐0
15Ak0 k.

Informal letters from general counsel of Housing and Urban Development (HUD) to members of Congress and HUD's position in litigation, regarding when payment of yield spread premiums (YSP) from mortgage lenders to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA), even if inconsistent with HUD's subsequent statement of policy (SOP) on the matter, lacked force of law and, therefore, did not preclude *Chevron* deference to SOP. Real Estate Settlement Procedures Act of 1974, §8, 12 U.S.C.A. §2607.

[10] Statutes ⇐0
361k0 k.

Resolution of ambiguity in a statutory text is often more a question of policy than of law.

[11] Administrative Law and Procedure ⇐0
15Ak0 k.

That court may prefer a different interpretation of a statute is not enough to deny deference to an agency interpretation.

[12] Administrative Law and Procedure ⇐0
15Ak0 k.

Courts generally must defer to an agency's statutory interpretation that is at odds with circuit precedent, so long as the agency's answer is based on a permissible construction of the statute.

[13] Federal Civil Procedure ⇐0
170Ak0 k.

District court abused its discretion by granting class certification to borrowers suing mortgage lender, alleging that lender's payment of yield spread premiums (YSP) to mortgage brokers violated the Real Estate Settlement Procedures Act (RESPA); court applied incorrect legal standard in light of statement of policy (SOP) issued by Department of Housing and Urban Development (HUD). Real Estate Settlement Procedures Act of 1974, §8, 12 U.S.C.A. §2607; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

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Appeal from the United States District Court for the Northern District of Alabama.

Before EDMONDSON, Chief Judge, and COX and GIBSON [FN*], Circuit Judges.

EDMONDSON, Chief Judge:

*1 [1][2] First Union Mortgage Corporation appeals the district court's grant of class certification to a class of plaintiffs seeking damages for First Union's alleged violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). *See* 12 U.S.C. § 2601, et. seq. We accepted jurisdiction over this appeal. *See* Fed.R.Civ.P. 23(f). We review a district court's certification of a class for abuse of discretion. *See Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir.2002). For a district court to apply the wrong legal standard is an abuse of discretion. *See id.* We vacate the grant of class certification.

BACKGROUND

This case is one of several dealing with RESPA's effect on the legality of the payment of Yield Spread Premiums (YSP) by mortgage lenders to mortgage brokers. For a detailed discussion of YSP's and their role in the real estate mortgage market, see *Culpepper*

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v. Inland Mortgage Co., 132 F.3d 692, 694 (11th Cir.1998) (*Culpepper I*) and *Culpepper v. Irwin Mortgage Co.*, 253 F.3d 1324, 1326 (11th Cir.2001) (*Culpepper III*). [FN1] A YSP is a payment made by a lender to a broker in exchange for that broker's delivering a mortgage that is above the "par rate" being offered by the lender. Briefly stated, the payment is typically a certain percentage of the total amount of the loan; the exact percentage is determined by the extent to which the actual interest rate exceeds the par rate. These YSP's potentially violate Section 8(a) of RESPA, which prohibits the payment of kickback fees and referrals in association with mortgage lending.

In *Culpepper III*--argued the same day as this case--we concluded that class certification in a case alleging a violation of RESPA was appropriate where the payment of a YSP was based solely upon the amount by which the loan rate exceeded the par rate and where the payment of the YSP was not tied to specific services provided by the broker. Because whether this standard was satisfied could be determined on a class-wide basis, we concluded that the district court in *Culpepper III* did not err by granting class certification. *See Culpepper III*, 253 F.3d at 1332.

Shortly after our *Culpepper III* ruling, the Department of Housing and Urban Development issued a Statement of Policy (the 2001 SOP), [FN2] purportedly clarifying a Statement of Policy issued in 1999 (the 1999 SOP). [FN3] Our ruling in *Culpepper III* had relied heavily on the 1999 SOP. According to First Union, the 2001 SOP is at odds with the outcome of *Culpepper III* and compels a different result in this case.

DISCUSSION

***2** Before we address the substance of the 2001 SOP, we must determine its applicability to this case. Although the 2001 SOP raises some concerns about the retroactive application of agency interpretations, about the deference given to policy statements, and about the ability of an agency interpretation to overrule prior circuit precedent, we ultimately conclude that nothing prevents the application of the 2001 SOP to this case.

I. Retroactive Application of the 2001 SOP

[3] The 2001 SOP was promulgated after the transactions that gave rise to this litigation and after the district court's ruling on the issue of class certification. But because we accept that both the 2001 SOP and the statement it interprets, the 1999 SOP, are clarifications of existing law [FN4] and not new rules or regulations, no problem with the retroactive application of the statements exists. *See Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir.1999) ("[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law"); *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir.1993), *overruled on other grounds, Johnson v. Apfel*, 189 F.3d 561 (7th Cir.1999) ("A rule simply clarifying an unsettled or confusing area of the law ... does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.' ") (quoting *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936)); *see also Farmers Telephone Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir.1999); *Orr v. Hawk*, 156 F.3d 651, 654 (6th Cir.1998); *Cowen v. Bank United of Texas*, 70 F.3d 937, 943 (7th Cir.1995).

[4][5][6] While not dispositive, an agency's determination that a new statement is a clarification of existing law, rather than an entirely new rule, is generally given much weight. *See Pope*, 998 F.2d at 483. We will defer to an agency's statement that a new rule is a clarification of the law, instead of a new rule altogether, unless "the prior interpretation ... is patently inconsistent with the later one." *Id.* Another significant indicator that a statement only clarifies existing law is when the law supposedly being clarified is ambiguous. *See Piamba Cortes*, 177 F.3d at 1283-84.

We accept that the 2001 SOP created no new rule, but instead only clarified the interpretation of RESPA found in the 1999 SOP. The 2001 SOP itself states that it is merely clarifying the 1999 SOP; and nowhere in the 2001 SOP does HUD claim to be changing the law. And, we do not consider the 2001 SOP to be "patently inconsistent" with RESPA or with the 1999 SOP. In *Culpepper III* we wrote that the 1999 SOP was "ambiguous" and subject to different interpretations. *Culpepper III*, 253 F.3d at 1327. Based upon these considerations, we conclude that the 2001 SOP is a clarification of existing law and that no retroactivity problems prevent its application to this case.

II. *Chevron* Deference

***3** [7] An additional preliminary question is what deference, if any, should be given to the 2001 SOP.

No deference is to be given to an agency interpretation that is at odds with the plain meaning of the statute being interpreted. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). But RESPA

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does not, by its plain language, speak to the standard for determining whether the payment of a YSP violates the Act. Section 8(a) of RESPA simply prohibits kickbacks and referral fees, *see* 12 U.S.C. § 2607; Section 8(c) allows payment "for services actually performed in the making of a loan." The question of how to determine when a YSP is an illegal kickback and when it is a legally permissible payment for services actually performed is not specifically addressed in RESPA. Our ruling in *Culpepper III* did not purport to rely squarely upon the plain language of Section 8 of RESPA, but rather upon an *interpretation* of RESPA's language and of the "ambiguous" 1999 SOP. *See* *Culpepper III*, 253 F.3d at 1329-1330. The plain language of RESPA does not prevent us from giving deference to the 2001 SOP. [FN5]

A question also exists about whether the 2001 SOP is the kind of agency statement to which the courts should give broad deference. In *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001), the Supreme Court wrote that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 2171. RESPA contains an express delegation of congressional authority: the statute authorizes the Secretary of HUD "to prescribe such rules and regulations, *to make such interpretations*, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter." 12 U.S.C. § 2617(a) (emphasis added). HUD regulations identify a "statement of policy" as a document that embodies such a "rule, regulation, or interpretation" under RESPA's delegation of authority. *See* 24 C.F.R. § 3500.4(a)(1)(ii). [FN6]

Because the power to issue interpretations is expressly delegated in RESPA, the 2001 SOP carries the full force of law. As a result, we give deference to the 2001 SOP. The precedents are not to the contrary. In *Mead* and *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the Supreme Court concluded that certain kinds of agency pronouncements were not due broad *Chevron* deference. *See* *United States v. Mead Corp.*, 121 S.Ct. at 2173-74 (concluding that Customs Service ruling letter was not entitled to *Chevron* deference); *Christensen*, 120 S.Ct. at 1662-63 (concluding that Department of Labor opinion letter was not entitled to *Chevron* deference). But, neither of the agency interpretations at issue in *Mead* and *Christensen* involved an agency acting pursuant to a statutory delegation of interpretive power. In this case, on the other hand, a congressional delegation of authority giving HUD's Statement of Policy the force of law does exist. And, the interpretation we are reviewing--the 2001 SOP--was promulgated pursuant to that delegation of authority.

*4 [8] Given the express delegation of authority in RESPA, formal notice-and-comment is not needed to extend deference to the 2001 SOP. *See* *Barnhart v. Walton*, --- U.S. ----, ---- - ----, 122 S.Ct. 1265, 1271-72, 152 L.Ed.2d 330 (2002) (stating that *Chevron* deference can still apply even in the absence of a notice and comment period); *Mead*, 121 S.Ct. at 2173 ("[T]he want of [notice and comment] here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.") (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995)).

[9] We also reject the argument that the 2001 SOP is due no deference because it is inconsistent with earlier expressions of HUD's position. We cannot say that the 2001 SOP is "inconsistent" with the 1999 SOP. The 1999 SOP was "ambiguous." The 2001 SOP clarifies that ambiguity. Plaintiff also points to letters from HUD's general counsel to members of Congress and points to a lawsuit filed by the United States; Plaintiff says these things show that HUD's position, before the 2001 SOP, was consistent with the way we interpreted the 1999 SOP in *Culpepper III*. We reject this argument for several reasons. First, we are unconvinced that the letters and pleadings Plaintiff identifies are inconsistent with the 2001 SOP. At best, they reflect the ambiguity we saw in the 1999 SOP. Second, the kinds of documents identified by Plaintiff-- informal letters written by agency lawyers and positions taken in litigation-- are the kinds of informal policy positions that lack the force of law and are unentitled to *Chevron* deference. *See* *Mead*, 121 S.Ct. at 2175; *Christensen*, 120 S.Ct. at 1662. Even if the 2001 SOP is inconsistent with these informal indications of policy, we cannot say that the official position of HUD on the present issue has been inconsistent. We conclude, therefore, that the 2001 SOP is within the realm of agency interpretations that carry the force of law and are due broad deference.

We also reject the argument that the 2001 SOP is inconsistent with clear congressional intent and, therefore, is due no *Chevron* deference. *See* *Chevron*, 104 S.Ct. at 2782. We cannot say that HUD's interpretation violates Congress's clear intent in enacting RESPA. *See, e.g.*, *Bjustrom v. Trust One Mortgage Corp.*, 178 F.Supp.2d 1183, 1196

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(W.D.Wash.2001); *Levine v. North American Mort.*, 188 F.R.D. 320, 328-29 (D.Minn.1999). One of RESPA's stated goals is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). The test laid out in the 2001 SOP, which does ban fees in excess of what would be reasonable compensation for the broker's service, seems to fulfill that ultimate goal. In addition, nothing in the language of RESPA itself compels the conclusion that HUD's test for the legality of YSP's-- admittedly more lenient than that adopted in *Culpepper III*--violates congressional intent.

***5** [10][11] That we may have determined in *Culpepper III* that a different interpretation of RESPA (in our view) is better or more consistent with the statutory language does not require--or even allow--us to reject HUD's interpretation. "[T]he resolution of ambiguity in a statutory text is often more a question of policy than of law." *Florida Manuf. Housing Ass'n, Inc. v. Cisneros*, 53 F.3d 1565, 1572 (11th Cir.1995) (quoting *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991)); *see also Gonzales v. Reno*, 212 F.3d 1338, 1349 (11th Cir.2000) ("[T]he courts cannot properly reexamine the wisdom of an agency-promulgated policy."). That we may prefer a different interpretation is not enough to deny deference to the agency interpretation. *See Florida Housing*, 53 F.3d at 1572 ("[T]he court need not conclude that the agency construction was the only one it permissibly could have adopted ... or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.") (quoting *Chevron*, 104 S.Ct. at 2782 n. 11). We conclude, therefore, that the 2001 SOP is entitled to *Chevron* deference. [FN7]

III. Effect of 2001 SOP On *Culpepper III*

[12] We also conclude that the rule announced in the 2001 SOP can, in effect, overrule the holding of *Culpepper III*. "Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as the agency's answer is based on a permissible construction of the statute." *Satellite Broadcasting and Communications Ass'n of America v. Oman*, 17 F.3d 344, 347 (11th Cir.1994)(internal quotations omitted); *cf. Lechmere v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 847-48, 117 L.Ed.2d 79 (1992) ("Once we have determined a statute's *clear meaning*, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.") (emphasis added) (quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 2768, 111 L.Ed.2d 94 (1990)).

IV. Application of the 2001 SOP

***6** We conclude that the substance of the 2001 SOP compels a different result in this case than the result in *Culpepper III*. The 2001 SOP explicitly rejects the foundation of *Culpepper III*: "neither Section 8(a) of RESPA nor the 1999[SOP] supports the conclusion that a yield spread premium can be presumed to be a referral fee based solely upon the fact that the lender pays the broker a yield spread premium that is based upon a rate sheet, or because the lender does not have specific knowledge of what services the broker has performed." 2001 SOP, 66 Fed.Reg. at 53,055.

According to the 2001 SOP, the first step in assessing whether RESPA has been violated is to determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction. [FN8] Contrary to the conclusion in *Culpepper III*, the lender and the broker need not be able to tie the YSP payment to specific services provided. If this first step is satisfied, the fact-finder must proceed to the second step: determining whether the total compensation paid to the broker is reasonably related to the total value of the goods or services actually provided. *See* 2001 SOP, 66 Fed.Reg. at 53,055.

[13] Based on the 2001 SOP, we conclude that the district court did abuse its discretion in granting class certification in this case. Federal Rule of Civil Procedure 23(a) identifies four requirements which must be satisfied before a class can be certified. These elements are the requirements: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a).

In this case, the district court concluded that the requirements were met. The district court determined that common questions of fact were dominant because the class representative alleged these things: 1) for each class member's loan, the amount of the YSP was based solely upon the amount by which the loan rate exceeded the par rate; and 2) for each class member's loan, the YSP was not tied directly to specific additional services provided by the broker.

The 2001 SOP, however, makes clear that facts such as those alleged are not sufficient to establish a violation

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of RESPA. Instead, it is necessary to determine whether compensable services were provided by the broker and whether the total amount of broker compensation was reasonable in the light of the circumstances of each loan. In granting class certification, the district court therefore applied what we now see as an improper legal standard. *See Piamba Cortes*, 177 F.3d at 1282-83 (appellate court reversing district court by applying a clarifying protocol--which carried the force of law--to Warsaw Convention even though the protocol was ratified by Senate only after the district court rendered its decision). The district court therefore abused its discretion when it granted class certification.

In sum, we conclude that the 2001 SOP may be retroactively applied to this case, that the SOP is entitled to deference, and that the SOP's interpretation of RESPA is contrary to and, in effect, overrules *Culpepper III*. Because the 2001 SOP demonstrates that the district court applied the wrong legal standard, the district court abused its discretion in granting class certification. Therefore, the district court's grant of class certification is hereby vacated, and we remand for further proceedings consistent with this opinion.

*7 VACATED AND REMANDED.

FN* Honorable John R. Gibson, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

FN1. *See also Culpepper v. Inland Mortgage Corp.*, 144 F.3d 717 (11th Cir.1998) (*Culpepper II*) (denying motion for rehearing in *Culpepper I*).

FN2. Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed.Reg. 53,052 (Oct. 18, 2001).

FN3. Real Estate Settlement Procedures Act Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed.Reg. 10,080, 10,080 (March 1, 1999).

FN4. The 2001 SOP states that it was "issued to *eliminate any ambiguity* concerning the Department's position with respect to ... yield spread premiums," and that, "in issuing this Statement of Policy, the Department *clarifies* its interpretation of [RESPA] in [the 1999 SOP]." 66 Fed.Reg. at 53,052 (emphasis added). Likewise, the 1999 SOP states that it was issued pursuant to Congress's direction that HUD "*clarify* its position on lender payments to mortgage brokers...." 1999 SOP, 64 Fed.Reg. at 10,080 (emphasis added).

FN5. The Eighth and Ninth Circuits have both concluded that the 2001 SOP is not inconsistent with the plain language of RESPA. *See Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir.2002) ("We must first determine whether the language of [Section] 8(c)(2) unambiguously forbids HUD's interpretation. It does not.") (internal marks and citations omitted); *Glover v. Standard Federal Bank*, 283 F.3d 953, 963-965 (8th Cir.2002) ("HUD's two-part test [from the 2001 SOP] is fully consistent with RESPA.").

FN6. In *Culpepper III*, we wrote that 24 C.F.R. § 3500.4(a)(1)(ii) imbues HUD Statements of Policy interpreting RESPA with "the force of a regulation." *See Culpepper III*, 253 F.3d at 1327.

FN7. The Ninth Circuit has also concluded that the 2001 SOP is due *Chevron* deference. *See Schuetz*, 292 F.3d at 1012 ("*Chevron* deference is due even though HUD's Policy Statements are not the result of formal rulemaking or adjudication.").
And, because we conclude that the 2001 SOP is entitled to deference as an interpretation of RESPA, we need not consider whether the 2001 SOP would also be entitled to deference as an interpretation of HUD's own ambiguous regulations, 24 C.F.R. § 3500.14, under the rule of *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). We also need not consider whether the 2001 SOP would be entitled to deference based upon its power to persuade. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

FN8. The kinds of services that would satisfy the first element of the test are laid out in the

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1999 SOP. *See* 64 F.R. at 10,085. The first element of the test does have some substance: a payment to a broker who provides "no, nominal, or duplicative work" would violate RESPA.

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